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RECENT DEVELOPMENT

SPRINGER V. ERIE INS. EXCH.: AN INSURER MAY NOT INVOKE A BUSINESS PURSUIT EXCLUSION TO ABANDON ITS DUTY TO DEFEND WITHOUT CONSIDERING THE CONTINUITY AND PROFIT MOTIVE OF ITS INSURED'S BUSINESS.

By: Lauren Ellison

The Court of Appeals of Maryland held that for a third party complaint to trigger a “business pursuits” exclusion, the insurer must consider the insured’s business continuity and profit motive. *Springer v. Erie Ins. Exch.*, 439 Md. 142, 146, 94 A.3d 75, 78 (2014). The court further held that the allegations made in the third party’s complaint were insufficient to trigger the “business pursuits” exclusion. *Id.*

In 2011, J.G. Wentworth initiated suit against David Springer (“Springer”) and Sovereign Funding Group (“Sovereign”) for defamation and false light. Springer and Sovereign allegedly operated publicly accessible websites containing false and misleading information in an effort to target competitor J.G. Wentworth’s potential and existing customers. Springer and Sovereign directed potential customers to visit those particular websites while openly denying any connection to the sites.

In response to the suit filed by J.G. Wentworth, Springer contacted his insurer, Erie Insurance Exchange (“Erie”). Springer requested that Erie provide him with legal representation and claimed that they were required to do so under the terms of his home insurance policy. Springer’s policy included a provision for personal injury; however, Erie denied Springer’s request, citing the policy’s “business pursuits” exclusion clause. This clause negated the insurer’s liability to defend its policyholder if the policyholder is accused of a “personal injury arising out of business pursuits” With his request denied, Springer retained counsel to defend the cause of action initiated by J.G. Wentworth, which was subsequently dismissed with prejudice.

Springer attempted to recover the cost of his legal representation from Erie. Erie refused, and Springer brought suit seeking declaratory relief and damages for breach of contract; Erie also counterclaimed seeking declaratory relief. Both Erie and Springer filed motions for summary judgment. The Circuit Court for Frederick County granted summary judgment in favor of Erie and entered a declaratory judgment in favor of Erie. The court held that the J.G. Wentworth complaint was sufficient to trigger the “business pursuits” exclusion, and therefore, Erie had no duty to defend. Springer subsequently filed a timely appeal. However, before the court of special appeals could render a decision, the Court of Appeals of Maryland issued a writ of certiorari *sua sponte*.

The court began its analysis by addressing how it interprets ambiguous terms in an insurance policy. *Springer*, 439 Md. at 158, 94 A.3d at 84-85. When faced with ambiguous terms, the court focuses on the policy's "customary, ordinary, and accepted meaning." *Id.* at 158, 94 A.3d at 85 (citing *MAMSI Life & Health Ins. Co. v. Callaway*, 375 Md. 261, 279, 825 A.2d 995, 1005 (2003)). In the instant case both "business pursuits" and "arising out of" were undefined within the policy and the parties disputed their meanings; therefore, the court looked elsewhere for guidance. *Springer*, 439 Md. at 159-61, 94 A.3d at 85-86.

Relying on precedent, the court concluded that the phrase "arising out of" is interpreted broadly and does not require the harmful act to be the sole cause of the injury. *Springer*, 439 Md. at 159, 94 A.3d at 85 (citing *N. Assurance Co. of Am. v. EDP Floors, Inc.*, 311 Md. 217, 230, 533 A.2d 682, 689 (1987)). Specifically, the court concluded "arising out of" to mean "originating from, growing out of, flowing from, or the like." *Springer*, 439 Md. at 159, 94 A.3d at 85 (citing *N. Assurance Co. of Am.*, 311 Md. at 230, 533 A.2d at 688)).

The court recognized that the inquiry did not end there, and proceeded to synthesize the meaning of a "business pursuit." *Springer*, 439 Md. at 160, 94 A.3d at 86. Although "business" was defined in the policy, the term "business pursuit" was not. The court stated the implicit purpose of such business exclusions is to remove from a homeowner's policy the type of coverage that should be covered under a separate business insurance policy. *Id.* at 160-61, 94 A.3d at 86 (citing *Erickson v. Christie*, 622 N.W.2d 138, 140 (Minn. Ct. App. 2001)). Because the Court of Appeals of Maryland had never had the opportunity to examine a business pursuit exclusion, it looked to the Court of Special Appeals of Maryland for guidance.

Previously, the court of special appeals held that when an insured is engaged in a professional pursuit requiring his or her time and energy, and receives compensation, the act is a "business pursuit." *Springer*, 439 Md. at 162, 94 A.3d at 87 (citing *McCloskey v. Republic Ins. Co.*, 80 Md. App. 19, 22-25, 559 A.2d 385, 386-88 (1989)). Although "business pursuit" has been defined by the intermediate court, it did not identify specific variables for an insurer to consider. *Springer*, 439 Md. at 162, 94 A.3d at 87.

The Court of Appeals of Maryland opted to rely on commentators and sister courts in adopting a functional two-pronged test. This test stated that to constitute a "business pursuit," an action must have both continuity and profit motive. *Springer*, 439 Md. at 162, 94 A.3d at 87 (citing J.A. APPLEMAN & J. APPLEMAN, *NEW APPLEMAN ON INSURANCE LAW* § 53.06(2)(d)(i)(lib. ed.)). Continuity is measured by determining whether there is continuous activity for the purpose of earning a livelihood. *Springer*, 439 Md. at 162, 94 A.3d at 87 (citing APPLEMAN, *supra*). Profit motive is measured by demonstrating that the business activity was undertaken as an attempt at financial gain. *Id.* (citing APPLEMAN, *supra*). The court concluded that continuity *and* profit motive must be considered when interpreting a "business pursuit exclusion." *Id.* at 164, 94 A.3d at 89 (emphasis added).

After adopting the two-pronged test, the court addressed its “duty to defend” jurisprudence as a related issue regarding third party complaints. *Springer*, 439 Md. at 164, 94 A.3d at 88. The court has limited the insurer’s ability to refuse defense of an insured solely on the basis of a third party complaint. *Id.* When establishing a duty to defend, a court must answer two questions: (1) what type of coverage is in question and what defenses are available under the terms of the specific policy, and (2) if the allegations in the suit could potentially bring the claim within the policy’s coverage. *Id.* at 167, 94 A.3d at 90 (citing *St. Paul Fire & Marine Ins. Co. v. Prysieski*, 292 Md. 187, 193, 438 A.2d 282, 285 (1981)). The court further asserts that the duty to defend should be construed liberally in favor of the insured. *Springer*, 439 Md. 167, 94 A.3d 90 (citing *Litz v. State Farm Fire and Cas. Co.*, 346 Md. 217, 231, 695 A.2d 566, 572 (1997)).

Having determined the two-prong analysis for the “business pursuits” exclusion and an insurer’s duty to defend, the court applied these principles to the case at hand. The court ultimately held that the allegations in the complaint were facially insufficient to invoke the “business pursuits” exclusion, and were insufficient to uphold the lower court’s rulings for declaratory relief and summary judgment in favor of Erie, the third party. *Springer*, 439 Md. at 167-68, 94 A.3d at 90-91. The court’s indecision as to whether Springer was the CEO of Sovereign and if Sovereign was actually a registered business entity at the time the suit was filed created enough uncertainty that required the court to further explore the extent of the alleged “business pursuit.” *Id.* The court also noted that without any information regarding profit motive, the “business pursuits” exclusion could not be triggered. *Id.* at 168. The court vacated the ruling, and remanded for further proceedings. *Id.* In *Springer*, the Court of Appeals of Maryland held that an insurer cannot invoke the “business pursuits” exclusion without first considering the insured’s business continuity and profit motive. *Springer* has established a threshold that insurance companies must meet prior to denying a policyholder legal representation under an exclusion within the policy. The court’s decision minimizes the insurer’s discretion in denying legal representation on the forefront of a third party lawsuit against an insured. Even if there is only a slight possibility that the complaint consists of an activity protected under the policy’s coverage, the insurance company will be required to legally represent the insured. Insurance providers should be aware of the exclusion language in their policies and be prepared to carefully draft new policy exclusions to avoid ambiguity.